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February 28, 1996

William F. Caton, Acting Secretary
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JEROLD L. JACOBS

Re: MM Docket No. 92-214
FM Table of Allotments
Columbia, Bourbon, Leasburg,
Gerald, Dixon and Cuba, MO


DOCKET FILE COPY ORIGINAL

Dear Mr. Caton:

Enclosed herewith for filing, on behalf of our client, Lake Broadcasting, Inc., are an original and four (4) copies of its "CONSOLIDATED REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION" in the above-referenced matter.

Please direct all inquiries and communications concerning this matter to the undersigned.

Very truly yours,


Jerold L. Jacobs

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEB 28 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 92-214
Table of Allotments,)
FM Broadcast Stations) RM-8062, RM-8144,
(Columbia, Bourbon, Leasburg,) RM-8145, RM-8146,
Gerald, Dixon, and Cuba, Missouri) RM-8147

TO: Chief, Allocations Branch
Mass Media Bureau

CONSOLIDATED REPLY TO OPPOSITIONS
TO PETITION FOR RECONSIDERATION

LAKE BROADCASTING, INC. ("Lake"), licensee of Station KBMX(FM), Eldon, Missouri, permittee of Station KFXE(FM), Cuba, Missouri, and an applicant for a new FM broadcast station on Channel 244A at Bourbon, Missouri (File No. BPH-921112MH), by its attorneys, pursuant to §1.429(g) of the Commission's Rules, hereby replies to the oppositions to Lake's Petition for Reconsideration filed by Zimmer Radio of Mid-Missouri, Inc. ("Zimmer") and by Reichel Broadcasting Corporation ("RBC") in this proceeding. In support whereof, Lake shows the following:

1. On January 11, 1996, Lake filed a timely "Petition for Reconsideration" ("Petition") of the Report and Order ("R&O"), 10 FCC Rcd 12624 (1995), in this proceeding. In it, Lake did not challenge the R&O's grant of Zimmer's request that KCMQ's facilities be upgraded to Channel 244C1, but it did oppose the decisions to: (a) allot Channel 297C3 to Cuba and make the channel available for application, instead of substituting Channel 297C3 for Channel 271A at Cuba and modifying Lake's construction permit accordingly; and (b) allot Channel 221A to Dixon. On February 15, 1996, Lake also filed Comments supporting the

Petition for Reconsideration ("Petition") filed by Central Missouri Broadcasting, Inc. ("CMB").

I. Channel 297C3 Should Be Substituted For Channel 271A At Cuba

2. Lake maintained in its Petition (at ¶¶'s 2-7) that the R&O erred by allotting Channel 297C3 as a second FM frequency in Cuba (instead of substituting Channel 297C3 for Channel 271A). Concerning the Cuba allotment, Zimmer forthrightly states (Opp. at 4) that it has no objection to the substitution of Channel 297C3 for Channel 271A. It did not file a new-station application in the January 9 - February 9, 1996 Cuba filing window and essentially agrees with Lake's view that in its September 28, 1995 "Supplemental Comments" in this proceeding (at 5, 6, and 7), Zimmer dropped its interest in Cuba in September 1995 -- two months before the R&O was released -- and fully intended its September 28, 1995 pleading to be construed as an abandonment of its Cuba expression of interest. Id. On the other hand, RBC, which did file an application in the Cuba filing window, urges that Zimmer's withdrawal of its expression of interest should be ignored by the Commission and that, in any event, RBC's filing should be treated as a new expression of interest which keeps the allotment of Channel 297C3 as a second frequency in Cuba viable.

3. Lake commends Zimmer's frankness and urges that its "admission against interest" concerning its loss of interest in the Cuba frequency should be given full weight by the Commission. RBC's bootstrapping effort to create an artificial legal basis for maintaining the Cuba filing window should be rejected and its application should be dismissed. Lake notes that Footnote 12 of the R&O states that the processing of any applications for Channel 297C3 at Cuba "may be deferred pending the outcome of MM Docket 89-120". Nevertheless, Lake urges that FM Table of Allotments (Oakdale and Campti LA), 7 FCC Rcd 7600, 7601 ¶7 (Mass

Media Bur. 1992), should not be interpreted to treat RBC's application as a "timely" expression of interest overriding Zimmer's abandonment of interest. The reason is simply that the Commission's established policy is to accept and consider late-filed expressions of interest in a frequency "only in a situation where there is no opposition to the channel proposals and where there would be no adverse impact on another pending proposal". See FM Table of Allotments (Hazlehurst and Bude MS), 10 FCC Rcd 2164, 2164 n.3 (Mass Media Bur. 1995)(emphasis added), citing FM Table of Allotments (Santa Isabel PR), 3 FCC Rcd 2336 (1988), aff'd sub nom. Amor Family Broadcasting v. FCC, 918 F.2d 960 (D.C. Cir. 1990).

4. In the instant case, RBC's application is clearly "late-filed" as an expression of interest in this rulemaking proceeding, since the proper time for such expressions expired in November 1992 -- three and one-half years ago. Moreover, Lake has vigorously opposed the allotment of Channel 297C3 as a second frequency at Cuba (instead of substituting that frequency for the current Channel 271A) in Paragraphs 5-7 of its Petition because maintaining Channel 271A in the Table of Allotment erroneously forecloses Lake from upgrading Station KBMX to Channel 270C1 at Eldon. Thus, Lake submits that there is no legal or public interest basis for retaining RBC's application on file where, as here, the underlying expression of interest in the allotment has been timely abandoned. See FM Table of Allotments (Jacksonville NC et al.) ("Jacksonville"), DA 95-2335, released December 8, 1995 (reconsideration granted to delete channel from FM Table of Allotments where expression of interest was timely withdrawn). Importantly, in Jacksonville, supra, the Commission did not act upon a stay motion before a filing window opened and then had to dismiss the applications filed in that window when the channel was deleted. The same thing should happen here. Lake filed its Cuba counterproposal in the reasonable expectation that it would be afforded protection under §1.420(g)(1) of the Rules

against untimely expressions of interest in Channel 297C3. RBC's application is untimely, and it should not be allowed to thumb its nose at Commission rule and case precedent when faced with Zimmer's timely withdrawal of its expression of interest in Channel 297C3.

II. Channel 221A Should Not Be Allotted To Dixon At This Time

5. Lake and CMB strongly disagree with the R&O's Dixon allotment decision. Specifically, Lake urged (Petition at ¶¶'s 1 and 8-9) that the R&O erred by allotting Channel 221A at Dixon, instead of holding that proposal in abeyance pending the outcome of the related FM rulemaking proceeding in MM Docket No. 89-120 (FM Table of Allotments (Northwye, Cuba, Waynesville, Lake Ozark, and Eldon MO) ("Docket 89-120"), 7 FCC Rcd 1449 (Mass Media Bur. 1992)). As explained in Footnote 11 of the R&O, the allotment of Channel 221A to Dixon conflicts with Lake's proposal in Docket 89-120 to allot that channel to Waynesville, Missouri. While allotting Channel 270C2 to Lake at Eldon, instead of Channel 270C1, would not require allotting Channel 221A to Waynesville (in lieu of Waynesville's present Channel 272A), the allotment of Channel 221A to Dixon forecloses the possibility of allotting Channel 270C1 to Lake at Eldon. In other words, allotting Channel 221A to Dixon permanently prejudices the outcome of Docket 89-120 by precluding the allotment of Channel 270C1 to Lake at Eldon. CMB's Petition shares Lake's concerns.

6. Zimmer and RBC both dispute the views of Lake and CMB that the R&O's allotment of Channel 221A at Dixon at the present time has the same administrative due process and public policy infirmities as the R&O's failure to substitute Channel 297C3 for Channel 271A at Cuba (discussed in Section I above). They maintain that Lake erred in not withdrawing its Class C2 compromise proposal sooner and that CMB's arguments about the economic non-

viability of a Channel 221A allotment at Dixon are nothing more than a transmitter site preference. Lake disagrees on both counts.

7. As Lake showed in its Petition, it was attempting to fashion an immediate "global solution" in Docket 89-120 by proposing "an immediate Class C2 upgrade" for its Eldon station in a January 5, 1993 "Supplement to Petition for Reconsideration" filed in that Docket. See Petition, ¶4. Therefore, the R&O erred by attempting to make use of Lake's Class C2 compromise proposal three years after it was proffered! Id. Obviously, Lake's offer lapsed by its own terms long ago, and the R&O could not properly revive it. Id. Lake also pointed out that its previous offer called for grant of an immediate Class C2 upgrade to Lake's KBMX, but the R&O makes no grant at all to Lake; it only holds out the possibility that a Class C2 upgrade may some day be granted to KBMX in Docket 89-120 (a rulemaking proceeding being held in abeyance pending the outcome of a Lake-related revocation proceeding in MM Docket No. 95-154). In sum, Lake stated (id.) that, under these circumstances, the R&O's attempted use of Lake's compromise proposal in this belated and halfway manner in this proceeding violated the letter and spirit of the offer and Lake's administrative due process rights.

8. RBC attempts (Opp. at ¶¶'s 7-11) to rebut Lake's showing by arguing that since Lake has never withdrawn its pending "one-step" application to upgrade KBMX to Channel 270C2 at Eldon (File No. BPH-930922IE), "the Commission staff had every reason to believe that Lake was still interested in obtaining a Class C2 upgrade if it could not get a Class C1" (id. at ¶9) and that "the Commission staff was not aware that Lake had abandoned its Class C2 proposal" (id. at ¶11). However, both arguments are legally and factually flawed. First, it is clear that there is no mutual exclusivity -- technically, legally, or logically -- caused by Lake having a Class C2 application pending simultaneously with a Class C1 rulemaking proposal: if

the application had been granted first, Lake could have built it while it awaited action on the pending rulemaking upgrade to Class C1; if the rulemaking proposal had been granted first, Lake would have amended its pending Class C2 application to specify Class C1. Put differently, the Commission does not require applicants to "switch rather than fight" in its proceedings. See Cuban-American Limited, 2 FCC Rcd 3264, 3265 ¶8 (Rev. Bd. 1987). In the instant case, since it was legally, technically, and logically correct -- and, indeed, excellent Commission strategy -- for Lake to proceed toward its Class C1 objective by the application and the rulemaking route, Lake cannot be faulted for that strategy now, nor, as illustrated above, does that strategy demonstrate at all that Lake's Class C2 interest was inconsistent with, or superseded, its abiding Class C1 desire.

9. The second flaw in RBC's presentation is that Lake's January 1993 Class C2 offer specifically stated that it was for "an immediate Class C2 upgrade at its present transmitter site in the Eldon proceeding" (January 5, 1993 "Supplement to Petition for Reconsideration" in Docket 89-120 (at 2)(emphasis in original)). Given the underlined word "immediate," Lake submits that, factually and legally, neither RBC nor the Commission staff could be "not aware" as a matter of law that this rulemaking offer had a limited time frame. Moreover, the R&O could not reasonably conclude that this "immediate" offer was still viable three years later. In sum, since allotting Channel 221A to Dixon is based on a misuse of Lake's stale compromise proposal in Docket 89-120 and permanently prejudices the outcome of Docket 89-120 by precluding the allotment of Channel 270C1 to Lake, the Dixon allotment violates Commission case precedent and Lake's due process rights and should not be allowed.

10. The force of Lake's objections is enhanced by CMB's own objections to the R&O's allotment of Channel 221A to Dixon, instead of the Channel 243A frequency that CMB

requested. As CMB succinctly stated in Paragraph 4 of its Petition, it proposed the allotment of Channel 243A to Dixon at reference coordinates east of the city, based on its special knowledge of that market and "its assessment of the economic viability of the undertaking". According to CMB, "[t]his would permit the station to draw on a larger and more stable audience and economic base while offering the opportunity to provide a first local service to Dixon." Id. However, allotting a first local service to Dixon west of the city -- as would be necessitated by the R&O's choice of Channel 221A instead of Channel 243A -- makes the project "not economically viable". Id. Contrary to RBC's objection, CMB's concerns do not reflect a mere preference for one transmitter site over another. Rather, they embody powerful economic and "real world" allotment arguments and CMB's view (which Lake shares) that, in making a "fair, efficient, and equitable distribution of radio service" throughout the United States under Section 307(b) of the Communications Act of 1934, as amended, the Commission should be primarily concerned that its new allotments be economically viable as well as legally and technically correct.

11. In sum, Lake and CMB have presented strong legal and public interest arguments against the allotment of Channel 221A to Dixon (or, at minimum, the holding in abeyance of such an allotment pending the outcome of Docket 89-120). Lake submits that the allotment of Channel 221A to Dixon is not economically viable or legally and technically correct.

III. Depriving Lake of a Class C1 Upgrade Opportunity Is "Inequitable" As Well As Unlawful

12. In Paragraph 7 of its Petition, Lake maintained that sound public policy reasons also support the rejection of the R&O's effort to use Lake's stale KBMX Class C2 proposal to

sever mutual exclusivity with Docket 89-120, because the "areas and populations" differences between upgrading KBMX to Channel 270C2 or to Channel 270C1 are so dramatic that foreclosing Lake from upgrading to Channel 270C1, based on a stale compromise proposal, would be unfair, inefficient, and inequitable as a matter of law. Zimmer disputes Lake's analysis (Opp. at 7), claiming that Lake's proposed Class C2 60 dBu contour at Eldon contains 149,462 persons within 8,553 square kilometers, instead of 67,275 persons within 5,027 square kilometers.

13. However, as the following Table indicates, even if Lake uses Zimmer's data, the disparity between Class C1 and Class C2 "areas and populations" data are still significant enough to make foreclosing KBMX from obtaining a Class C1 upgrade inequitable as well as unlawful. Moreover, the Table also shows that the effects of Zimmer's upgrade to Channel 244C1 from Channel 244C3 are quite similar to Lake's C2/C1 data. Since Zimmer used its proposed increases in "areas and populations" as a key justification for severance of its upgrade from the rest of this proceeding (Feb. 15, 1996 Motion to Sever at 5), it should be estopped from arguing that such disparities have no public interest importance in this proceeding.

<u>Facilities</u>	<u>60 dBu Area from Census</u>	<u>60 dBu Population</u>
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LAKE:

Ch. 270A	2,332 sq. km.	39,446
Ch. 270C2	8,553 sq. km.	149,462
Ch. 270C1	15,565 sq. km.	269,040

ZIMMER:

Ch. 244C3	4,345 sq. km.	148,505
Ch. 244C1	16,435 sq. km.	335,000

Therefore, Lake urges that it is contrary to administrative due process and established allotment principles for the Commission to foreclose Lake from the possibility of obtaining a Class C1 upgrade by allotment actions in this proceeding, pending the outcome of Docket 89-120, unless the Commission concludes here, as Lake urges, that Channel 297C3 should be substituted for Channel 271A at Cuba and Channel 243A should be allotted to Dixon, instead of Channel 221A.

IV. Channel 264A May Provide A "Global Solution"

14. Finally, Lake welcomes the realizations by Zimmer (Opp. at 8) and by RBC (Opp. at ¶17) that Channel 264A -- which Lake attempted to bring to the Commission's attention in Lake's January 5, 1993 "Supplement to 'Motion for Acceptance of Late-Filed Emergency Pleading and Reply Comments" in MM Docket No. 91-352 (Ava, Branson, and Mountain Grove MO) -- may be available to Waynesville, Missouri, in lieu of Channel 221A, which would eliminate the conflict with the allotment of Channel 221A to Dixon that Lake has protested in this proceeding. Lake agrees that if the Commission grants reconsideration in Docket 89-120 and allots Channel 264A, instead of Channel 221A, to Waynesville, the mutual exclusivity between this proceeding and Docket 89-120 will be severed in a way which does not foreclose the possibility of allotting Channel 270C1 to Lake at Eldon. However, before Channel 264A can be allotted to Waynesville, the Commission will have to rule on the pending petitions for reconsideration in MM Docket No. 90-66. Until that happens, it is clearly premature to use the potential availability of a multi-proceeding "global solution" involving Channel 264A as a basis for denying Lake's Petition.

15. Lake looks forward to the day when the Commission will allot Channel 264A (or Channel 221A) to Waynesville in Docket 89-120 and pave the way for mutually beneficial upgrades for Zimmer and Lake. This may be accomplished by the Commission taking

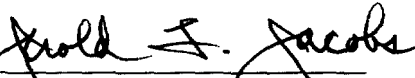
immediate and simultaneous action to conclude the Docket 90-66 rulemaking proceeding and allot Channel 264A to Waynesville in the Docket 89-120 proceeding (while continuing to hold the latter proceeding in abeyance as to Lake's Class C1 upgrade proposal). In that way, the Channel 221A allotment to Dixon in this proceeding can be finalized without permanently precluding the allotment of Channel 270C1 to Eldon. Until then, Lake urges that the Dixon Channel 221A allotment denies Lake's administrative due process rights, violates the paramount public interest in fair, efficient, and equitable channel allotments, and should be denied or held in abeyance.

V. Conclusion

WHEREFORE, in light of the foregoing, the Commission should grant reconsideration of the R&O.

Respectfully submitted,

LAKE BROADCASTING, INC.

By 
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Dated: February 28, 1996

CERTIFICATE OF SERVICE

I, Yvonne Corbett, a secretary in the law offices of Rosenman & Colin LLP, do hereby certify that on this 28th day of February, 1996, I have caused to be mailed, or hand-delivered, a copy of the foregoing "**CONSOLIDATED REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION**" to the following:

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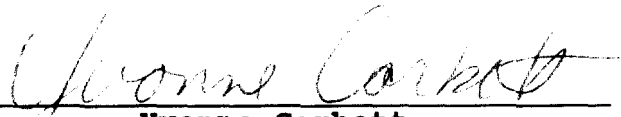
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